

MUSILLI, BRENNAN, LETVIN & PARNELL, PLLC

24001 Greater Mack, St. Clair Shores, MI 48080-1408

586-778-0900, Fax 586-778-1204

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-vs-

NICHOLAS JACKSON,

Defendant/Appellant.

RALPH MUSILLI, P18132
DENNIS M. FULLER, P40666
MUSILLI, BRENNAN, LETVIN & PARNELL, PLLC,
Attorney for Defendant/Appellant
24001 Greater Mack Avenue
St. Clair Shores, Michigan 48080
(586) 778-0900

CHERYL A. MATTHEWS, P44761
Prosecuting Attorney
1200 N. Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656

Supreme Court No.:

C.A. No.: 242050 *6pm 12/21/03*

Circuit Court No.: 01-177534-FC

*Oakland
C. O'Brien*

DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

~~12552~~
125250
A16
4/13
24937

FILED

DEC 16 2003

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Index of Authorities | ii |
| Statement of Judgment Appealed From and Relief Sought | iv |
| Questions Presented for Review..... | v |
| Concise Statement of Proceedings and Facts. | 1 |
| Argument | 12 |
| I. Standard of Review | 12 |
| II. The Decedent’s Statements Are Inadmissible Hearsay | 13 |
| III. The Alleged Victim’s Prior False Accusations of Criminal Sexual Conduct Are Admissible | 21 |
| Conclusion and Relief Requested | 24 |

INDEX OF AUTHORITIES

| | <u>Page</u> |
|--|-------------|
| <u>CONSTITUTION</u> | |
| Sixth Amendment | 13, 21 |
| Michigan Constitution Art. 1 § 20 | 13 |
| <u>CASES</u> | |
| <u>Alford v United States</u> , 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931). | 21 |
| <u>Chapman v California</u> , 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705 (1967) | 13 |
| <u>Fahy v Connecticut</u> , 375 U.S. 85, 86-87, 84 S.Ct. 229, 230-231, 11 L.Ed. 2d 171 (1963) | 13 |
| <u>Idaho v Wright</u> , 497 U.S. 805, 814, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). ... | 17, 18 |
| <u>Ohio v. Roberts</u> , 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980)..... | 17 |
| <u>People v Anderson</u> , 446 Mich 392, 405-406 (1994) | 13 |
| <u>People v Carson</u> , 87 Mich App 163 (1978)..... | 14 |
| <u>People v Dale Williams</u> , 191 Mich App 269 (1991). | 5 |
| <u>People v Gee</u> , 406 Mich 279, 282 (1979). | 14, 15 |
| <u>People v Hackett</u> , 421 Mich 338 (1984) | 21, 23 |
| <u>People v. Katt</u> , 4687 Mich 272 (2003)..... | 17, 19, 20 |
| <u>People v Lukity</u> , 460 Mich 484, 488 (1999) | 12 |
| <u>People v Smith</u> , 243 Mich App 657 (2000) | 14 |
| <u>People v Washington</u> , 251 Mich App 520 (2002)..... | 12 |
| <u>Yaldo v North Pointe Ins. Co.</u> , 217 Mich App 617, 623 (1996) | 12 |

STATUTES

MCL 750.520j 3, 21

Rules of Evidence

MRE 102 20

MRE 401 8, 23

MRE 402 7

MRE 404 8, 23

MRE 608 6

MRE 609 6

MRE 801©) 13

MRE 802 13

MRE 803 (2) 13, 14

MRE 803 (24) 16, 20

MRE 804 (b)(6)..... 4, 8

STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant/Appellant Nicholas Jackson seeks Leave to Appeal from the October 21, 2003 unpublished Opinion by the Court of Appeals, which Opinion affirms the trial court's evidentiary rulings and Mr. Jackson's conviction on three counts of first degree criminal sexual conduct.

The decision below presents issues involving principals of major significance to the state's bench and bar, in particular the failure properly to exclude inadmissible hearsay and its impact on the Sixth Amendment Right to Confrontation, and the admissibility of an alleged criminal sexual conduct victim's prior false accusation of criminal sexual conduct.

The Court of Appeals decision below is clearly erroneous, and it has resulted in the continued incarceration of Mr. Jackson, and as such causes material injustice. Additionally, the Court of Appeals decision conflicts with decisions of this Court, and with other decisions of the Court of Appeals.

For the reasons set forth in this Application for Leave to Appeal, Appellant respectfully requests that this Honorable Court grant him Leave to Appeal, reverse the Opinion of the Court of Appeals, vacate the jury verdict, remand the matter for a new Trial, and that the Court grant Appellant such other relief as is just in the premises.

QUESTIONS PRESENTED FOR REVIEW

- I. WHETHER THE COURT OF APPEALS DECISION AFFIRMING THE TRIAL COURT'S RULINGS IS CLEARLY ERRONEOUS WHEN THE TRIAL COURT GRANTED THE PROSECUTOR'S MOTION IN LIMINE ALLOWING THE PROSECUTOR TO ADMIT A DECEDENT'S HEARSAY STATEMENTS INTO EVIDENCE AT TRIAL, WHEN THE STATEMENTS ARE MADE AGAINST DEFENDANT AND ALLEGE THAT DEFENDANT COMMITTED THE SEXUAL ABUSE INCIDENT AT ISSUE, WHERE THE PROSECUTOR DID NOT CALL THE DECEDENT TO TESTIFY AT THE PRELIMINARY EXAM, WHERE DECEDENT'S STATEMENTS ARE NOT ADMISSIBLE PURSUANT TO THE EXCITED UTTERANCE HEARSAY EXCEPTION, AND WHERE THEY ARE NOT ADMISSIBLE PURSUANT TO THE "CATCH-ALL" HEARSAY EXCEPTION BECAUSE THE STATEMENTS ARE NOT MORE PROBATIVE THAN ANY OTHER EVIDENCE WHICH CAN BE PROCURED, WHERE THE SIXTH AMENDMENT CONFRONTATION CLAUSE REQUIRES THAT SUCH HEARSAY STATEMENTS HAVE A PARTICULARIZED GUARANTEE OF TRUSTWORTHINESS, WHERE THE COURT MUST DETERMINE THE TRUSTWORTHINESS OF THE STATEMENTS, WHERE THE COURT IN FACT MADE NO DETERMINATION OF TRUSTWORTHINESS, WHERE ADMISSION IS UNCONSTITUTIONAL, AND WHERE THERE IS A REASONABLE POSSIBILITY THAT THE STATEMENTS CONTRIBUTED TO THE CONVICTION?

The Trial Court would answer "No."

The People would answer "No."

Defendant answers "Yes".

- II. WHETHER THE COURT OF APPEALS DECISION AFFIRMING THE TRIAL COURT'S RULINGS IS CLEARLY ERRONEOUS WHEN THE TRIAL COURT GRANTED THE PROSECUTOR'S MOTION IN LIMINE EXCLUDING EVIDENCE REGARDING PRIOR SEXUAL ABUSE ALLEGATIONS BY THE ALLEGED VICTIM, WHEN PURSUANT TO THE SIXTH AMENDMENT CONFRONTATION CLAUSE THE TRIAL COURT MUST CONDUCT AN EVIDENTIARY HEARING TO DETERMINE

WHETHER SUCH EVIDENCE IS ADMISSIBLE IN LIGHT OF A DEFENDANT'S RIGHT TO CONFRONT WITNESSES, WHEN THE COURT CONDUCTED NO SUCH HEARING, WHEN THE PROFFERED EVIDENCE REVEALS THAT THE ALLEGED VICTIM'S PRIOR FALSE ACCUSATIONS OF SEXUAL ABUSE WERE REPRESENTED TO THE COURT AS HAVING RESULTED IN THE CONVICTION OF A PERPETRATOR, WHEN IN FACT THE ACCUSATIONS RESULTED IN NO CHARGES BEING FILED AND NO CONVICTION, WHEN THE ALLEGED VICTIM INFORMED HIS MOTHER AND OTHER WITNESSES THAT THE PRIOR ACCUSATIONS WERE FALSE, AND WHERE A COURT HEARING IN THIS REGARD WAS MANDATED BY THE CONSTITUTION?

The Trial Court would answer "No."

The People would answer "No."

Defendant answers "Yes."

CONCISE STATEMENT OF PROCEEDINGS AND FACTS

In the instant criminal matter Defendant Nicholas Jackson was charged with three counts of First Degree Criminal Sexual Conduct (CSC). The General Information charges Mr. Jackson with having engaged in two counts of sexual penetration, to-wit: fellatio, and one count of sexual penetration, to-wit: rectal penetration, with Anthony Matthew Hines, Mr. Jackson's stepbrother, a person under thirteen years of age. (**Exhibit A**).

Nicholas is currently 23 years old. Nicholas' mother, Delores Hines, was married to Anthony Leroy Hines (hereinafter Tony Hines), her second husband, and living in Michigan with Tony Hines and his biological son, Anthony Matthew Hines (hereinafter Anthony Hines). (Tr. V, May 6, 2002 Trial Transcript, p. 203-204). In April or May 2000 Nicholas was living with these family members, but in about late August 2000 he moved to Kentucky to live with his biological father. (Tr. V, p. 224-225). Nicholas had been beaten by Tony Hines. (Tr. V, p. 235-236).

In November 2000 Nicholas traveled from Kentucky to Michigan to attend a niece's birthday party. He was to stay with his mother Delores, stepfather Tony, and stepbrother Anthony, for a few days, attend the party, and return home to Kentucky. (Tr. V, p. 225-226). In the later hours of November 16, 2000 or in the early hours of November 17, 2000 it is alleged that Nicholas engaged in the complained of acts with his stepbrother Tony Hines. No report was made at that time, but rather, Tony Hines appeared by himself at the Waterford Township Police Department at least six, and perhaps more, hours later to "complain" of the "incident", and made various verbal statements, and completed a written statement regarding the matter. (**Exhibit B**). (Tr. V, p. 107-110). The written statement alleges that Tony "caught" Nicholas "molesting" his son Anthony, and that he (Tony) opened the bedroom door and saw that Nicholas' penis was in Anthony's mouth. The police

questioned Nicholas, and he eventually wrote his own written statement regarding the matter (**Exhibit C**), which states in essence that at some point after he went to sleep he awoke to find his stepfather (Tony) at the bedroom door, and his brother (Anthony) jumping off of him (Nicholas) onto his own bed. The police later conducted a second interview some months later, and Nicholas wrote another statement at that time, which statement includes more information than the earlier statement, because it reports that when Nicholas was asleep he woke up to find Anthony's head under his (Nicholas') bedcovers, and it felt like Anthony had Nicholas' penis in his mouth. (**Exhibit D**). When asked at Trial to explain the varying information the two statements, Nicholas stated that he was afraid of his stepfather (Tony) because of problems which they had encountered in the past, and that he had previously been beaten by Tony. (Tr. V, p. 235-236).

Pursuant to the police narrative (which refers to Anthony as "Andrew Hines"), "Andrew" was previously the victim of a sexual assault in Tennessee, and the suspect in that incident was convicted and sent to prison. (**Exhibit E**). However, Counsel later learned that while Anthony had previously raised allegations of sexual abuse in Tennessee, the matter was investigated and closed, and never resulted in the filing of any charges. At the time that these earlier allegations of sexual abuse were raised, Tony and Anthony had returned to the South in contemplation of moving there, and Anthony was staying with his mother Charlotte Hines. The person who was the alleged wrongdoer, a Billy Ray Mealer, was the then fiancé of Charlotte Hines, and was residing with her in Tennessee. (Tr. V, p. 167). Mr. Mealer informed Defendant Counsel that these allegations were false, and Charlotte Hines informed Counsel that Anthony had made the false abuse accusations at the prompting of his father, Tony Hines. Defendant Counsel wanted to have this information and other information regarding Decedent's reliability admitted into evidence, and made an offer of proof in this regard.

(Tr. IV, May 3, 2002 Trial Transcript, p. 12-14; Tr. V, p. 189-194). Counsel for the People did not raise any objection, procedural or substantive to the Offer of Proof, but objected only to the admission of the evidence contained in the Offer of Proof. In fact, counsel for the People requested an Offer of Proof in this regard (Tr. IV, p. 7), and the Court allowed defense counsel to make various offers of proof regarding the matter during the Trial.

In or about January 2001 the People filed criminal sexual conduct charges against Nicholas Jackson, and a preliminary examination was conducted on March 26, 2001 in the 51st District Court before the Honorable Phyllis C. McMillen. At the end of the preliminary examination Judge McMillen bound the matter over to the Circuit Court for trial on three charges, two charges of CSC, fellatio, and one charge of CSC, rectal penetration. The only witnesses testifying at the preliminary examination were Anthony Hines and Detective Gary Bryan of the Waterford Township Police Department. The Prosecutor admittedly failed or refused to have Tony Hines testify at the preliminary examination. (Tr. I, March 26, 2001 Preliminary Exam Transcript); (Tr. IV, p. 8-10, 17-19).

The Prosecutor's office eventually discovered that Tony Hines' daughter, Ashley Hines, his daughter by Charlotte Hines, had made allegations of sexual abuse against Tony Hines. On August 5, 2001, Tony Hines died. The autopsy report revealed the presence of an array of drugs. (Exhibit F, Excerpt from Autopsy of Tony Hines). Thereafter, on or about November 7, 2001 the Prosecutor filed a Motion in Limine Pursuant to MCL 750.520j and MRE 402, requesting that the Court rule that evidence of Ashley Hines' allegations of sexual abuse against Tony Hines be barred from trial, and that any evidence of prior sexual assaults of Anthony Hines also be barred. The Prosecutor also filed a Motion in Limine Pursuant to MRE 803 (24) and 803 (2), requesting that the Court rule that

Decedent Tony Hines' hearsay written and oral statements be held admissible at trial. Mr. Jackson's original defense counsel was representing him at that time.

The motions were set for hearing, and the hearing was conducted on November 21, 2001. While no order was entered after the motion hearing, the Court granted the Prosecutor's Motions in Limine. (Tr. II, November 21, 2001 Motion Transcript, p. 9). The matter was set for trial to commence on November 26, 2001. However, on November 26, 2001 Defendant Nicholas Jackson entered a plea to the charges against him, and the matter was set for sentencing on January 22, 2002.

Defendant Counsel, Mr. Musilli, was then retained by Defendant. On January 17, 2002 Defendant filed a Motion to Withdraw Plea before Sentencing, and the matter was set for hearing on January 22, 2002. The motion included Mr. Jackson's affidavit in support of the motion, (**Exhibit G**), which stated among other things, that Mr. Jackson was innocent of the charges and that he agreed to plead to the charges only at the insistence and in response to scare tactics of his then counsel. Judge Chabot entertained oral argument on the motion, and granted it. The matter then was again scheduled for trial, and as Judge Chabot and Judge Colleen O'Brien had exchanged dockets at some point after November 2001, the matter was assigned for trial before Judge O'Brien.

On or about February 25, 2002 the Prosecutor suddenly forwarded an Order to Judge Chabot for entry by the Court, pursuant to the Seven Day Rule, which order addressed the November 2001 motions brought by the Prosecutor, but which motions were not as yet the subject of any Court order. (**Exhibit H**).

On or about March 4, 2002 Mr. Jackson filed an Objection to the entry of the above-cited Order submitted by the Prosecutor. On March 4, 2002 Mr. Jackson also filed his Motion in Limine Pursuant to MRE 401, 404, and MRE 804(b)(6) which motion requested that the Court bar Decedent

Tony Hines' hearsay statements from evidence at trial, and which requested that the Court allow Mr. Jackson to produce evidence of Anthony Hines' previous false accusations of sexual abuse at trial. **(Exhibit I)**. On or about March 13, 2002 Judge O'Brien reviewed the pending motions and the People's requested Order, but rather than make a decision regarding these matters, the Court referred them back to Judge Chabot for decision.

On April 10, 2002 Judge Chabot entertained argument on the matters, and at that time was informed by Defendant Counsel that People v Dale Williams, 191 Mich App 269 (1991), states that a victim's prior false accusations of criminal sexual conduct are relevant in subsequent prosecutions based upon a victim's accusations, because such false accusations bear directly upon the victim's credibility, and that preclusion of such evidence would abridge a defendant's constitutional right to confrontation. (Tr. III, April 10, 2002 Motion Transcript, p. 7). Defendant Counsel also informed Judge Chabot that Decedent Tony Hines' statements, whether written or spoken, are inadmissible hearsay, and as such should not be admitted into evidence at trial. (Tr. III, p. 9). Regardless, Judge Chabot endorsed the Prosecutor's reasoning, and entered an Order granting the Prosecutor's motions. **(Exhibit J)**. Defendant Counsel learned several days afterward that on April 8, 2002, two days before the hearing on the motions, Judge Chabot had already entered the Prosecutor's Order in this regard. **(Exhibit K)**.

Mr. Jackson filed an Application for Leave to Appeal the Trial Court's April 8 and 10, 2002 Orders in the Court of Appeals, requesting that the Court grant him leave to appeal the Circuit Court Orders of April 8 and April 10, 2002, and requesting that the Court enter a stay of the Circuit Court proceedings, and that the Court reverse the Circuit Court Orders. The Application for Leave to Appeal was assigned docket number 240953. As the trial date was quickly approaching, Mr.

Jackson also filed a Motion for Immediate Consideration regarding his Application for Leave to Appeal. By Order of May 3, 2002 the Court of Appeals granted Mr. Jackson's Motion for Immediate Consideration, but denied his Application for Leave to Appeal, "for failure to persuade the Court of the need for immediate appellate review". The Court also denied Mr. Jackson's Motion for a Stay of the Circuit Court proceedings. (**Exhibit L**).

Counsel appeared and the matter went to trial before the Honorable Colleen O'Brien of the Oakland County Circuit Court. Jury selection commenced on May 3, 2002, and trial in earnest began on May 6. The jury returned a guilty verdict on May 7, 2002.

On May 3, 2002, before the jury was selected, counsel addressed various matters before Judge O'Brien. Defense Counsel explained the problem which flowed from the earlier Evidentiary rulings according to which both the written and alleged verbal statements of Decedent Tony Hines would be admitted into evidence. Defense Counsel argued that he should be able to explore evidence which demonstrated that the statements were not reliable, particularly where the statements were not made under oath, where Tony Hines was not called by the Prosecutor to give testimony during the preliminary examination, and where Charlotte Hines would testify that on an earlier occasion Tony Hines had prompted his son Anthony Hines to make false accusations of molestation against Billy Mealor. (Tr. IV, p. 7-14). Defense Counsel also stated that while the Prosecutor would ask the jurors to rely on Tony Hines' statements, the Defendant was severely hampered in demonstrating the statements' unreliability, and counsel wanted to be able to raise Tony Hines' criminal history. (Tr. IV, p. 9-12). The Court eventually ruled that the various defense witnesses could testify regarding Tony Hines' reputation for truthfulness or untruthfulness, and regarding any evidence of a crime having an element of dishonesty or a falsehood, and the Court based its rulings

on MRE 608 and MRE 609. (Tr. V, p. 45-46). Defense Counsel stated that while MRE 609 may allow certain types of evidence to be admitted, the rule has nothing to do with the cross examination of a witness pursuant to the confrontation clause of the Constitution. (Tr. V, p. 48-49). Defense Counsel again reiterated the problems inherent with his inability to cross examine Tony Hines and the inability to cross examine him regarding statements that he made, and he informed the Court that he would attempt to stay within the boundaries of the Court's Evidentiary rulings, (Tr. V, p. 48-49). It is obvious that Defense Counsel clearly expressed Defendant's constitutional right to confront all witnesses against him, even those who were dead, and the clear negative impact that the Court's rulings would have on Defendant.

Pursuant to the Court's rulings the Court allowed one of the investigating officers, Officer Biggs, to testify regarding Tony Hines' verbal statement made to him on November 17, 2000. Tony Hines did not simply exclaim that something had happened during the night, but rather, he responded to questions by the officer. (Tr. V, p. 118-119). The officer stated that when he first observed Tony Hines he was sitting quietly in the police station lobby. (Id.). Tony Hines was not in any distress or in an excited state, but later became emotional only after the officer walked him into another area and began talking to him. (Id.) The Officer testified "[H]e seemed very emotional. At times while speaking to him he was crying and he just seemed like he was having a hard time.... he came in and he had reported that his stepson who came to visit, I believe from Kentucky and he said that earlier in the morning, I believe it was approximately maybe 2:30 in the morning, somewhere around there that he heard some giggling in the bedroom and the stepson and his son were sharing a bedroom while the stepson was up visiting. Said he heard some giggling and he stated that when he went into room he seen his son performing oral sex on the stepson." (Tr. V p. 107-108).

Officer Biggs also read Tony Hines' written statement to the jury. (Tr. V p. 109-110). Defense Counsel again objected to the entry of all of Tony Hines' statements. (Tr. V p. 109).

As the Court and the Prosecutor were well aware, Mr. Jackson wanted fully to apprise the Court and the jury of the fact that Tony Hines' statements were unreliable, or at minimum, highly questionable, in light of the fact that Tony Hines had previously instructed his son Anthony to make false allegations of abuse against Billy Mealor in order to influence a child custody matter regarding Anthony, and that he had molested his daughter Ashley, in order to argue to the Court and the jury that Tony Hines instructed his son Anthony to make the instant allegations against Mr. Jackson. Tony Hines may even have instructed Anthony to climb on top of Mr. Jackson while he was sleeping in order that Tony Hines could then "discover" the act by entering the bedroom. (Tr. V p. 45, 47-49). (Tr. IV p. 12-14), (People's Motion in Limine Pursuant to MCLA 750.520j and MRE 402; People's Motion in Limine Pursuant to MRE 803 (24) and 804 (2); Defendant's Motion in Limine Pursuant to MRE 401, 404 and MRE 804 (6) [**Exhibit I**]). It was and is Defendant's contention that Tony Hines coached Anthony Hines, and perhaps others, to raise serious criminal sexual conduct allegations against various individuals in efforts to obtain results affecting the living arrangements in the Hines' household, and perhaps for other unknown reasons as well.

When the prosecution rested, Defendant Counsel made a motion for directed verdict. The Court denied the motion. (Tr. V, p. 185-190). Defendant Counsel then made yet another offer of proof regarding evidence which would have shown Tony Hines' unreliability, which evidence he was ready to present through his witnesses. Counsel for the People again did not object to the Offer of Proof or to the fact that it consisted of a combination of testimony and Mr. Musilli's paraphrasing of the testimony which would be presented to the Court through the witnesses then present at Trial.

(Tr. IV, p. 190-194). The evidence included the fact that Tony Hines physically abused his wife, that he molested his children, and that he himself was molested as a child. (Tr. V, p. 190-191). The evidence also included the fact that Tony Hines' mother had also been molested as a child, and that his father had molested him as well. (Tr. V, p. 191). The evidence also would have included Ashley's statements that Tony Hines had recently molested her, that Tony Hines's mother had induced Anthony Hines to make false allegations of sexual molestation against Billy Mealor, and that Tony Hines was a drug abuser. (Tr. V, p. 191-192). The Court stated that Defendant Counsel's offer of proof was on the record, and the Court again denied the request to admit the information into evidence. (Tr. V, p. 193-194).

At trial Anthony Hines testified that Nicholas Jackson forced him to perform fellatio, and that Nicholas performed fellatio on him. (Tr. V p. 62-67). He also testified that at some point about three or four months earlier, Nicholas Jackson tried to insert his penis into Anthony's rectum. (Tr. V, p. 73-75).

Ashley Hines also testified at trial. She stated that she arrived in Michigan on December 10, about three weeks after the alleged November 16, 2000 incident. (Tr. V, p. 173). She stated that in February she had a conversation with her brother Anthony, and they spoke about the alleged incidents involving Nicholas Jackson, and that Anthony told her that "Nick really didn't do it. That my dad did it and that my dad said that if he didn't say that Nick did it, then he would beat him or he would kill himself.". (Tr. V, p. 174). She testified that the statement occurred after she told Anthony "what my dad did to me" (Id.), but the circumstances surrounding what Tony Hines "did to [her]" were not admissible per the Court's earlier orders. The jury thus was never allowed to consider vastly important information regarding his habitual abuse, his plans and motives, and

regarding his directing the children to claim abuse on various occasions in furtherance of those motives. Ashley also stated that Anthony seemed afraid when he gave her this information. Id.

Defendant Nicholas Jackson also testified at trial regarding the November 16 incident. He stated that he woke up and discovered his stepbrother Anthony under his covers, and it felt as though Anthony had his (Nicholas') penis in his mouth. (Tr. V, p. 234-235). He stated that he did not report this to the police in his first statement, as he was afraid of his stepfather Tony Hines. Id. He denied ever forcing Anthony to engage in any sexual acts. (Tr. V p. 236). When the prosecutor asked him whether Anthony had "just decided to get into, take off his clothes, get under your, the covers and suck your penis, that's your testimony?" (Tr. V p. 238-239), Nicholas answered that he did not believe that it was Anthony's decision to do these things, (Tr. V p. 239). Again, when the prosecutor asked him whether Tony Hines' entry into the bedroom during the alleged incident was a great coincidence, Nicholas stated "If you knew more about him [Tony Hines] you would understand him." (Tr. V p. 240-241). Thus Defendant was trying to convey the fear and control which Tony Hines exercised over Anthony, and thereby expose other reasons to explain Anthony's actions and accusations against Defendant. The Trial Court's rulings however prevented testimony regarding Anthony's earlier unproven allegations of sexual misconduct, and as such the jury remained ignorant of Anthony's earlier allegations.

The Court's ruling thus made it impossible for Nicholas Jackson to testify about the serious problems which he had experienced with Tony Hines including beatings, etc., and including his defense that Tony Hines had instructed Anthony to raise allegations of sexual abuse in the past, which allegations were determined to be false.

Delores Hines also testified. She stated that on the date in question Tony Hines and Nicholas “could not be around each other” pursuant to directives of the police. (Tr. V, p. 205). She also stated that after the alleged incident Anthony denied that Nicholas forced him to touch Nicholas “down there.” (Tr. V, p. 209-210). While Anthony was talking to Delores, Tony Hines was displaying his belt and threatening to hit Anthony with it (Id.), apparently forcing him to speak.

The Prosecutor, armed with the Court’s Evidentiary rulings regarding Tony Hines, was able to attack Nicholas Jackson with not only the testimony of Anthony Hines, but the “testimony” of Tony Hines as well. Indeed, the Prosecutor told the jury that while the testimony of Anthony Hines would probably be sufficient in the matter, she would present the testimony of Tony Hines as well, to corroborate Anthony’s testimony. (Tr. V p. 26-27). She also relied heavily on the Tony Hines testimony, as she described for the jury how Tony Hines was “very distraught”, and how he went to the Waterford Township Police Department and was “very tearful”. (Tr. V p. 26-27). Again, at the end of trial, the Prosecutor’s closing statement included a description of Tony Hines walking into the bedroom, stating: “[B]ig Anthony did walk into the room and he interrupted what was going on in that room luckily for little Anthony. He interrupted what happened in there and boy was he freaked out.” (Tr. V p. 251-252). She also stated “[B]ig Anthony was obviously very upset, so upset that he went to the police at the earliest opportunity to file in the morning.” (Tr. V, p. 252). The prosecutor also stated that if the jury wanted to believe Nicholas Jackson’s account of the matter, then they would have to believe that Anthony Hines was a sexual aggressor, as they would have to believe that Anthony undressed himself and got under the Defendant’s bedcovers when he was asleep. (Tr. V p. 251). Defendant Nicholas Jackson’s counterpoint to the “sexual aggressor” assertion was and is that Tony Hines had instructed Anthony Hines to take the actions which he took,

for reasons which are not altogether known. However, pursuant to the Court's rulings, the Defendant was never able to explore and present any of the issues regarding Tony Hines to the jury.

On May 7, 2002 the Court charged the jury, and after deliberations the jury returned with a verdict of guilty on all three counts on First Degree SCS (Tr. VI, May 7, 2002 Trial Transcript, p. 24-26). Defendant's bond was then revoked and he was sent to jail. (Tr. VI p. 27-28). Defendant was sentenced on May 28, 2002 to 12-20 years. (**Exhibit M**).

On June 14, 2002 Mr. Jackson filed an Appeal by Right in the Michigan Court of Appeals. On October 21, 2003 the Court of Appeals issued an unpublished Opinion which affirmed the convictions below. (**Exhibit N**).

Mr. Jackson files the instant Application for Leave to Appeal in this Honorable Court, requesting that the Court review the matter, reverse the Court of Appeals Opinion, and remand the matter to the Circuit Court for a new Trial.

ARGUMENT

I. STANDARD OF REVIEW

A trial court's decisions regarding whether or not to admit evidence rests within the sound discretion of the Court. However, whether a statute or a rule requires exclusion, is a question of law which the Court of Appeals reviews de novo with the knowledge that it is per se an abuse of discretion "[t]o admit evidence that is inadmissible as a matter of law." People v Lukity, 460 Mich 484, 488 (1999). See also People v. Washington, 251 Mich App 520, 524 (2002). Constitutional issues present questions of law and are reviewed de novo on appeal. Yaldo v North Pointe Ins. Co., 217 Mich App 617, 623 (1996).

The right of an accused to confront witnesses against him is embodied in the Sixth Amendment to the Constitution, and is also embodied in the Michigan Constitution at Article I Section 20. The denial of this Constitutional right is reviewed pursuant to a harmless error test, that is, the Court must inquire whether the error is harmless beyond a reasonable doubt. People v Anderson, 446 Mich 392, 405-406 (1994) citing Fahy v Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230-231, 11 L.Ed. 2d 171 (1963), and Chapman v California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705 (1967). Harmless error review requires the beneficiary of the error to prove, and the Appellate Court to determine, beyond a reasonable doubt, that there is no reasonable possibility that the evidence complained of might have contributed to the Defendant's conviction. People v. Anderson, 446 Mich at 406.

II. THE DECEDENT'S STATEMENTS ARE INADMISSIBLE HEARSAY

The written and alleged oral statements made by Decedent Tony Hines are inadmissible hearsay. Pursuant to MRE 801(c) " 'hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pursuant to MRE 802, hearsay is not admissible except as provided by the Michigan Rules of Evidence. MRE 803 lists the various exceptions to the hearsay rule when the declarant's availability is immaterial. The Trial Court admitted Decedent Tony Hines' statements to the police pursuant to MRE 803(2), the excited utterance hearsay exception, and/or MRE 803(24), the "catch all" hearsay exception. Regardless, the statements did not qualify as admissible evidence pursuant to either exception.

MRE 803(2) states:

“Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

To come within the excited utterance exception, a statement must meet three criteria: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion. People v. Gee, 406 Mich 279, 282 (1979). While the amount of time that passes between the event and the statement is important in determining whether the declarant was still under the stress of the excitement when the statement was made, the actual focus of the exception is on the declarant’s “lack of capacity to fabricate, not the lack of time to fabricate.” People v. Smith, 456 Mich 453, 551 (1998), (emphasis added). In essence, the proposed statements must have been made while the declarant was still in a state of nervous excitement. People v. Carson, 87 Mich App 163(1978). The rule allows admission of hearsay testimony that would otherwise be excluded because it is presumed that a person who is still under the “sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trust worthy.” People v. Smith, 456 Mich 543, 550 (1998) citing 5 Weinstein, evidence (2d ed), section 803.04[1] p. 803-19.

In the instant case it is obvious that the Decedent’s statements, both verbal and written, are not admissible pursuant to the excited utterance exception, because there was a lapse of at least six hours between the alleged incident and the making of the statements, obviously enough time for the Decedent to contrive or misrepresent the matter as he saw fit. Additionally, Officer Biggs, the officer to whom the Decedent made the statements, testified that the Decedent’s statements were not

spontaneous, but rather in response to Officer Biggs' questions. (Tr. V p. 118-119). Likewise, Decedent chose not to go to the police station immediately, despite the fact that police stations never close, and chose instead to go to sleep. The Decedent arrived at the police station by himself, that is, he contrived to appear alone at the police station without Anthony Hines in order that he could first give his version of the incident to the police, and thereafter instruct Anthony to give the same version in his eventual interview with the police. Moreover, Decedent was calm and collected as he sat in the police station lobby, and allegedly became "emotional" only after questioning by officer Biggs. The Decedent's statements therefore were not spontaneous and do not qualify as admissible excited utterances. The Court's admitting the statements constitutes reversible error.

In affirming the Trial Court's finding that the statement were excited utterances, the Court of Appeals inexplicably disregarded the fact that Tony Hines slept after the incident, that he discussed the incident with Anthony, that he waited until the next morning to go to the police, that he was quietly sitting in the police station lobby while waiting to see an officer, and that his statements were made only after the officer began talking to him. In this milieu it is clear that Tony Hines had both the opportunity and capacity to fabricate a story regarding the incident.

The Court should also note that if the Prosecutor deemed Decedent's statements to be so valuable, the Prosecutor should have produced Decedent to testify at Defendant's preliminary examination. This failure to produce deprived Mr. Jackson of his only chance to cross-examine Decedent regarding his "corroborating" statements, and this constitutes one basis for the instant appeal. The wrongful admission of corroborating testimony on either side of a CSC case can "tip the scales" and result in reversible error. Gee, 406 Mich at 283. Likewise, the Court's admission of the statements allowed the Prosecutor the opportunity to argue to the jury that Mr. Jackson's

defense was that Anthony Hines was “the aggressor”, when in fact Mr. Jackson made several offers of proof which would have revealed that far from being an aggressor, Anthony Hines was a “pawn” of his father Tony Hines, and that his actions were the result of Tony Hines’ forcing him to make allegations against Mr. Jackson.

In light of Mr. Jackson’s inability to explore all facets of Anthony Hines’ allegations against him, in particular the role played by Tony Hines, Mr. Jackson was totally unable to defend himself. The Court’s admission of the hearsay statements as “excited utterances” therefore should be reversed.

As Tony Hine’s hearsay statements do not qualify as “excited utterances”, the only other avenue by which the statements could be admitted would be pursuant to MRE 803(24), the “catch all” hearsay exception. MRE 803(24) states:

“Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the Court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the Trial of hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer this statement and the particulars of it, including the name and address of the declarant.”

To be admitted under MRE 803(24), hearsay statements must (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the other enumerated hearsay exceptions, (2) be relevant to a material fact in the case, (3) be the most probative evidence of that fact reasonably available,

and (4) serve the interests of justice by its admission into evidence. People v. Katt, 468 Mich 272, 290 (2003).

The most important requirement in considering heresay evidence pursuant to MRE 803(24) is that the proffered statements have circumstantial guarantees of trustworthiness equivalent to those of the enumerated heresay exceptions. Katt 468 Mich at 290. “As the United States Court of Appeals for the Fourth Circuit noted in Clarke [2F.3d 81(C.A.4 1993)] ‘The inquiry into trustworthiness aligns with the inquiry demanded by the Confrontation Clause, which requires courts to examine the ‘totality of the circumstances that surround the making of the statement’ for ‘particularized guarantees of trustworthiness.’ Clarke, supra at 84. Thus, courts should consider the ‘totality of the circumstances’ surrounding each statement to determine whether equivalent guarantees of trustworthiness exist.” Katt, 468 Mich App 290-291.

While there is no exhaustive list of factors which should be evaluated in determining the trustworthiness of a heresay statement pursuant to the catch all exception, the confrontation clause forbids the use of corroborating evidence to determine the trustworthiness of statements offered if the declarant does not testify at Trial. Katt, 468 Mich App 291-292, citing Idaho v. Wright, 497 U.S. 805, 823, 110 S.Ct. 3139, 111 L.Ed. 2d 638 (1990).

The Wright Court also stated:

“We noted [in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980)] that the confrontation clause ‘operates in two separate ways to restrict the range of admissible heresay.’ ‘First, in conformance with the Framers’ preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case...the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.’ Second, once a witness is shown to be unavailable, ‘his statement is admissible only if it bears adequate ‘indicia of reliability’. Reliability can be inferred without more in a case where the evidence falls within a firmly routed heresay exception. In other cases, the

evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”

Wright, supra p.814, 110 S.Ct. 3139 (citations omitted).

The various factors which the Courts should consider in evaluating the trustworthiness of a hearsay statement pursuant to MRE 803(24) include:

- (1) The relationship between the declarant and the person to whom the statement was made;
- (2) The capacity of the declarant at the time of the statement;
- (3) The personal truthfulness of the declarant;
- (4) Whether the declarant appeared to carefully consider his statement;
- (5) Whether the declarant recanted or repudiated the statement after it was made;
- (6) Whether the declarant has made other statements that were either consistent or inconsistent with the proffered statement;
- (7) Whether the behavior of the declarant was consistent with the content of the statement;
- (8) Whether the declarant had personal knowledge of the event or condition described;
- (9) Whether the declarant’s memory might have been impaired due to the lapse of time;
- (10) Whether the statement, as well as the event described by the statement, is clear and factual;
- (11) Whether the statement was made under formal circumstances or pursuant to formal duties;
- (12) Whether the statement appears to have been made in anticipation of litigation and is favorable to the person who made or prepared the statement;
- (13) Whether the declarant was cross-examined by one who had interests similar to those of the party against whom the statement is offered;

(14) Whether the statement was given voluntarily or pursuant to a grant of immunity; and

(15) Whether the declarant was a disinterested bystander or rather an interested party.

See People v. Katt, 468 Mich at 291-292; People v. Lee, 243 Mich App 163, 178(2000).

Pursuant to the foregoing factors, Tony Hines' statements do not have particularized guarantees of trustworthiness. Tony Hines was a bigamist, and while married to Charlotte Hines he lied to her about his then existing marriage, about his fathering other children, and about his prior physical abuse against women. (Tr. V, p. 162-163). It is also obvious that Tony Hines prepared and carefully considered the statements before they were made, as evidenced by the fact that he discussed the matter with his then current wife, Delores Hines, discussed it with Anthony Hines, and enjoyed a night's sleep, before driving to the police station alone to report the incident. Indeed, when officer Biggs first observed Tony Hines in the police station, Tony Hines was not emotional, he was not crying, and in fact was calm and quiet. Additionally, the statements appear to have been made in anticipation of litigation, because, in the end, they could assist him in removing Nicholas Jackson out of his home and out of his life. This bias against Nicholas Jackson becomes more apparent in light of the fact that during the time that Nicholas Jackson was in the Hines' household, both he and Tony Hines were subject to "police orders" to stay away from each other. (Tr. V, p. 204-205).

Perhaps the most glaring indicia of the untrustworthy nature of the statements is the fact that the statements were never subjected to the rigors of cross-examination pursuant to the People's failure to produce Tony Hines at the preliminary examination. At any rate, as the statements do not have guarantees of trustworthiness equivalent to those of the enumerated hearsay exceptions, the first element of MRE 803(24), the trustworthiness element, is not met.

The second element of MRE 803(24), that the statements be relevant to a material fact, is met in the instant case, because the statements relate to alleged facts surrounding the incident. However the third element, that the evidence be the most probative evidence of the fact in issue is not met. This element is the equivalent of a “best evidence” requirement, and thus admission of statements pursuant to MRE 803(24) normally will not be available if there is non-hearsay evidence on point. People v. Katt, 468 Mich App 293, citing Larez v. Los Angeles, 946 F.2d 630, 643n.6(CA9 1991). In the instant case it is obvious that the proffered evidence is not the most probative evidence or the best evidence, because the best evidence is clearly that provided by Anthony Hines himself. The third element under the exception therefore is not met.

The fourth element of the exception, that admission of the proffered statement furthers the general purposes of the rules of evidence and the interest of justice, is also not met. Pursuant to MRE 102, the general purpose of the Rules of Evidence is to secure fairness in the administration and development of the law of evidence, to the end that the truth may be ascertained and proceedings may be justly determined. With this in mind, it is difficult to imagine how the admission of Decedent’s statements would assist in the ascertainment of the truth. The statements were made by a person who was a bigamist and a liar, and the statements were made at least six hours after the alleged incident, that is after Decedent had ample time to develop his “story”, to sleep, and plan to go to the police station without the alleged victim to tell his “story”. Thus admission of Decedent’s statements would not promote the ascertainment of the truth or further the interests of justice, but rather would promote fabrication and deceit. It is abundantly clear that Decedent’s statements do not meet the requirements of MRE 803(24), and as such are inadmissible hearsay.

Pursuant to Anderson, supra, it is obvious that there exists a reasonable possibility that Tony Hines' statements, both verbal and written, might have contributed to Mr. Jackson's conviction. Tony Hines' statements corroborated Anthony's statements, and it cannot be said beyond a reasonable doubt, that the statements did not contribute to the guilty verdict. It is therefore clear that the Trial Court's ruling that Decedent's statements were admissible hearsay led to the admission of inadmissible hearsay in violation of the Sixth Amendment of the Constitution. The Court's ruling in this regard is clear error, and should be reversed.

III. THE ALLEGED VICTIM'S PRIOR FALSE ACCUSATIONS OF CRIMINAL SEXUAL CONDUCT ARE ADMISSIBLE

In People v Hackett, 421 Mich 338 (1984) the Michigan Supreme Court addressed the rape-shield statute, MCL 750.520j, which aims at protecting an alleged abuse victim's privacy, and the interplay between the statute and the Sixth Amendment Confrontation Clause. The Court then reasoned that while the rape-shield statute acts to exclude evidence from trial, a blanket exclusion was impermissible in light of the Confrontation Clause. The Court stated:

"It is equally clear that while extent of cross-examination is within the discretion of the trial court, there is a dimension of the Confrontation Clause that guarantees to defendant a reasonable opportunity to test the truth of a witness' testimony. Alford v United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931). ... The fact that the legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's Constitutional right to confrontation. ... Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. ..."

People v Hackett, 421 Mich at 347-349 (citations omitted).

The Court then examined the rape-shield statute's provision for in camera hearings, embodied in subsection (2). The subsection states:

"(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

The Court then fashioned a hearing procedure by which a trial court could balance the competing interests at issue. The Court stated that where evidence of the complainant's past sexual conduct and/or false accusations are at issue, the defendant should make an offer of proof regarding the proposed evidence, and demonstrate its relevance to the purpose for which it is sought to be admitted. Id at 350. If a sufficient offer of proof as to the defendant's constitutional right of confrontation is made, the trial court must order an in camera evidentiary hearing to determine whether such evidence is admissible in light of the constitutional right. Id.

In the instant case the prior accusation incident at issue occurred when the alleged victim, Anthony, was living with his sister Ashley Hines, his mother Charlotte Hines and his mother's live-in boyfriend, Billy Ray Mealer. Both Ashley Hines and Anthony Hines suddenly began to make allegations that Billy Ray Mealer committed some type of sexual abuse upon them. The law enforcement officials contacted Charlotte Hines and Mr. Mealer as part of their investigation of the matter. The children later informed their mother that the allegations were false, and that they had been told to make the accusations to assist Decedent's mother in her efforts to obtain custody of Anthony Hines. No charges were ever brought, and the investigation was closed. However, when

Anthony Hines' instant accusations of sexual abuse by Mr. Jackson were raised in Waterford Township, Decedent Tony Hines and Anthony Hines informed the investigators that Anthony "was previously sexually assaulted in Tennessee, the suspect being convicted and sent to prison". (Exhibit E).

In the instant matter, Defendant Mr. Jackson filed his offers of proof in the form of his objections to the Order submitted by the Prosecutor for entry by the Court, and by way of his Motion in Limine Pursuant to MRE 401, 404 and 804(b)(6) filed on March 4, 2002. In short the Motion in Limine states that the Decedent Tony Hines' statements are inadmissible hearsay, and that Counsel had learned that the alleged victim had previously made false accusations of sexual abuse which, pursuant to various representations made to the Court, had resulted in charges and a conviction against some unnamed individual. The motion also stated that while the Court had been informed that a conviction had resulted from the alleged victim's sexual abuse accusations, Counsel informed the Court that no such charges had been filed, no conviction was made, and in fact the alleged perpetrator had been in contact with Defendant and his mother, Delores Hines, and that he had informed them that the accusations were false. The motion also informed the Court that Anthony's prior false accusations of sexual abuse were relevant and admissible as to credibility, and as proof of a motive, scheme or plan by the Decedent and/or Anthony to have Mr. Jackson removed from the Hines' household or other reasons. In these circumstances it is obvious that the Trial Court should have, at minimum, ordered the evidentiary hearing mandated in Hackett. The Court however never ordered such a hearing be held.

The instant case clearly provided the Trial Court with a scenario which justified further investigation. As the in camera hearing process promotes both the State's interest in protecting the

alleged victim's privacy interests, and safeguards the Defendant's right to a fair trial, and as the evidence at issue, prior false accusations of sexual abuse, are so highly charged, Mr. Jackson should have been entitled to the in camera hearing procedure to allow the Court to decide the admissibility issue. However, the Trial Court denied Mr. Jackson this right, and in so acting violated his right to confront the witnesses against him.

Additionally, the instant matter concerns not only false prior accusations of sexual abuse, but the deliberate falsification of facts given to the investigating authorities in Michigan. This information combined with Mr. Jackson's statement that the instant accusations were raised against him in an effort to have him removed from the household would have provided the jury with information which is exceedingly relevant, and which speaks directly to the alleged victim's credibility, plan and motive. The Trial Court therefore should have found that the evidence was admissible.

CONCLUSION AND RELIEF REQUESTED

For all of the above-stated reasons, Defendant Nicholas Jackson respectfully requests that this Honorable Court grant his instant Application for Leave to Appeal, or in the alternative, that the Court reverse the Court of Appeals Opinion, vacate the jury verdict, and remand this matter for Re-Trial.

Respectfully submitted,

MUSILLI, BRENNAN, LETVIN
& PARNELL, PLLC

Dated: December 15, 2003

By: 

Ralph Musilli, P181321
Dennis M. Fuller, P40666